

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE LARRY ALAN BURNS, JUDGE PRESIDING

UNITED STATES OF AMERICA,)
PLAINTIFF,) CASE NO. 07CR00329-LAB
VS.)
KYLE DUSTIN FOGGO,) SAN DIEGO, CALIFORNIA
BRENT ROGER WILKES,) OCTOBER 15, 2007
DEFENDANTS.) 9:00 A.M.
)
)

REPORTER'S TRANSCRIPT

STATUS CONFERENCE

APPEARANCES:

13 FOR THE GOVERNMENT: KAREN P. HEWITT, U.S. ATTORNEY
14 BY: PHILLIP L.B. HALPERN, ESQ.
15 JASON A. FORGE, ESQ.
16 VALERIE CHU, ESQ.
ASSISTANT U.S. ATTORNEYS
880 FRONT STREET
SAN DIEGO, CA. 92101

17 FOR DEFENDANT FOGGO: AKIN GUMP STRAUSS HAUER & FELD
18 BY: ELIZABETH TOBIO, ESQ.
PAUL BUTLER, ESQ.
19 1333 NEW HAMPSHIRE AVE., N.W.
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20 FOR DEFENDANT WILKES: GERAGOS & GERAGOS
21 BY: MARK J. GERAGOS, ESQ.
350 SOUTH GRAND AVENUE, 39TH FL.
LOS ANGELES, CA. 90071
22 -AND-
FEDERAL DEFENDERS, INC.
23 BY: REUBEN C. CAHN, ESQ.
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1 CONTINUED APPEARANCES:

2

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4 COURT REPORTER:

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COMPUTER-AIDED TRANSCRIPTION

1 SAN DIEGO, CALIFORNIA - MONDAY, OCTOBER 15, 2007 - 9:00 A.M.

2 THE CLERK: NO. 2, 07CR00329, UNITED STATES OF
3 AMERICA VERSUS KYLE DUSTIN FOGGO AND BRENT ROGER WILKES.

4 COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE
5 RECORD.

6 MR. FORGE: GOOD MORNING, YOUR HONOR. JASON FORGE
7 AND VALERIE CHU FOR THE UNITED STATES.

8 THE COURT: GOOD MORNING.

9 MR. BUTLER: GOOD MORNING, YOUR HONOR. PAUL BUTLER
10 AND ELIZABETH TOBIO FOR DEFENDANT FOGGO.

11 MR. CAHN: REUBEN CAHN AND SHEREEN CHARLICK WITH
12 MR. WILKES. IF I COULD STEP OUTSIDE AND HAVE HIM COME IN.

13 THE COURT: MR. WILKES IS PRESENT. NOW, YOUR TRACK
14 RECORD, MR. WILKES, IS STILL YOU HAVE BEEN AT EVERY HEARING
15 PERSONALLY.

16 THE MATTER IS ON TODAY FOR -- I AM ASSUMING IT IS ON
17 FOR CLARIFICATION. ALTHOUGH HAVING REVIEWED THE RECORD IN THE
18 CASE, I DON'T SEE THAT ANY CLARIFICATION IS NECESSARY.

1 PROSPECTIVE.

2 THE DEFENDANT IDENTIFIED 36 OR 34, MR. BUTLER,
3 ORIGINALLY, THE NUMBER OF WITNESSES?

4 MR. BUTLER: I BELIEVE 34, YOUR HONOR.

5 THE COURT: I HAVE IT HERE. THE DEFENDANT BELIEVED,
6 AFTER REVIEWING INITIAL DISCOVERY WOULD BE IMPORTANT TO
7 INTERVIEW IN CONNECTION WITH MR. FOGGO'S DEFENSE IN THIS CASE.
8 THAT WAS HIS OBLIGATION, AND I THINK FROM A PRACTICAL
9 STANDPOINT THAT GAVE THE GOVERNMENT EVERYTHING IT NEEDED TO
10 KNOW.

11 NOW, THEREAFTER, THE CIA OBJECTED AND SAID, "WE NEED
12 MORE SPECIFIC INFORMATION BECAUSE THIS IS TOUCHY STUFF.
13 NATIONAL SECURITY INTERESTS ARE IMPLICATED, AND THIS ISN'T THE
14 ORDINARY CASE." I UNDERSTAND ALL THAT. I REALLY DO. I GET
15 ALL THAT. IN FACT, I AM DEFERENTIAL TO MR. MCPHERSON, TO THE
16 CIA ON THOSE JUDGMENTS ON THE FIRST INSTANCE.

17 THEN THE QUESTION WAS, HOW DO WE DEAL WITH THAT. WE
18 HAVE GOT COMPETING INTERESTS HERE. WE HAVE A FELLOW WHO IS
19 FACING VERY SERIOUS CHARGES, 30 FELONY COUNTS, AND AT THE SAME
20 TIME A GOVERNMENT AGENCY THAT SAID, "LOOK, WE ARE ALL ABOUT
21 SECRECY AND ABOUT PROTECTING THE INTEREST OF THE UNITED
22 STATES, AND MAINTAINING SECRECY IS ABSOLUTELY ESSENTIAL TO THE
23 FORMER TASK."

24 HOW DO WE RECONCILE THOSE THINGS? WELL, I FOUND A
25 WAY, I THOUGHT, TO RECONCILE THOSE THINGS. I THINK THE DUTY

1 WAS TRIGGERED BY THE DEFENSE'S IDENTIFICATION OF THE WITNESS
2 IN THE FIRST INSTANCE.

3 THEN THE PROBLEM AROSE, GIVEN THE CIA'S RELUCTANCE
4 WITHOUT AN ADEQUATE -- WHAT THEY CONSIDER TO BE AN ADEQUATE
5 SHOWING TO ALLOW THE INTERVIEW OF THOSE WITNESSES. THE ISSUE
6 THAT AROSE IS HOW DO WE REACH SOME KIND OF COMPROMISE THAT
7 ACCOMMODATES BOTH INTERESTS.

8 I BELIEVE I DID THAT IN REQUIRING THE GOVERNMENT TO
9 INTERPOSE SOMEONE WHO WOULD ACT ON BEHALF OF THE UNITED
10 STATES, A FEDERAL PROSECUTOR, NOT SOMEONE FROM THE CIA,
11 BECAUSE I UNDERSTAND THEY ARE NOT CHARGED WITH DEFENDING THE
12 GOVERNMENT'S INTEREST IN THIS CRIMINAL PROSECUTION, BUT
13 SOMEONE SEPARATE AND APART FROM THE ACTUAL PROSECUTORS WHO
14 WOULD TRY THE CASE.

15 THE OBVIOUS LOGIC OF THAT IS THIS: HAVING DISCLOSED
16 WHO THESE WITNESSES ARE, I DON'T THINK THE DEFENDANT NEEDS TO
17 GO FURTHER WITH THE CASE PROSECUTORS AND SAY, "HERE IS WHY WE
18 WANT TO TALK TO THEM."

19 I REREAD THE PAPERS AGAIN JUST THIS MORNING. I READ
20 THEM EARLIER THIS WEEKEND, AND I REREAD THEM OVER COFFEE AGAIN
21 THIS MORNING. AND IT SEEMS TO ME THE ANALOGY IS LIKE SAYING,
22 "WE WILL LET YOU INTERVIEW THESE WITNESSES THAT YOU SEEK TO
23 INTERVIEW, BUT WE INSIST ON BEING PRESENT. WE INSIST ON
24 KNOWING WHAT YOU ARE ASKING THEM."

25 OF COURSE, THERE IS A LEGION OF CASES THAT SAY

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1 THAT'S NOT A LEGAL OR APPROPRIATE PREREQUISITE FOR THE
2 GOVERNMENT TO INTERPOSE IN A CASE LIKE THIS. THIS IS ABOUT
3 TANTAMOUNT TO IT, BECAUSE YOU ARE SAYING IN ESSENCE, "TELL US
4 WHAT YOU WANT TO ASK THEM. TELL US" -- THE CASE PROSECUTORS,
5 NOT JUST THE CIA, THE CASE PROSECUTORS. AND THAT RAISES FOR
6 ME A WHOLE HOST OF DUE PROCESS ISSUES AND FIFTH AMENDMENT
7 ISSUES.

8 IN THE ORDINARY CASE, THE DEFENDANT DOESN'T HAVE TO
9 DISCLOSE ANYTHING ABOUT HIS THEORY OF DEFENSE, WHAT WITNESSES
10 HE IS GOING TO CALL, WHERE HE PERCEIVES WEAKNESSES IN THE
11 GOVERNMENT'S CASE. AND YET, THE GOVERNMENT IS INSISTING IN
12 THIS CASE THAT BECAUSE IT IS SUBJECT TO THE PROVISIONS OF THE
13 CLASSIFIED INFORMATION PROTECTION ACT THAT IT TOTALLY TURNS
14 THE TABLES. I DON'T THINK IT DOES.

15 I THINK THAT TO FOLLOW THE PROCEDURES IS ONE THING.
16 THE DEFENSE IS WILLING TO FOLLOW THE PROCEDURE HERE. THEY ARE
17 WILLING TO MAKE THE SHOWINGS OF RELEVANCY THAT ORDINARILY THEY
18 WOULDN'T EVEN HAVE TO MAKE. THEY ARE WILLING TO DO THAT
19 PROVIDED THAT THE CASE PROSECUTORS DON'T KNOW ABOUT IT,
20 BECAUSE THEY DON'T WANT TO TELEGRAPH THEIR PUNCHES.

21 I THINK THAT'S PERFECTLY APPROPRIATE. AND IT SEEMS
22 TO ME A VERY PRACTICAL WAY TO ACCOMMODATE THAT IS TO DO WHAT I
23 SUGGESTED AND ORDERED LAST TIME WHICH IS TO INVOLVE ANOTHER
24 UNRELATED PROSECUTORS, GOVERNMENT PROSECUTORS ON THE CASE. I
25 THINK THE AGREEMENT WAS BY CONSENSUS LAST TIME THAT IT WOULD

1 BE SOMEONE FROM THE DEPARTMENT OF JUSTICE.

2 I THOUGHT, AS I READ THE TRANSCRIPT, TO MAKE SURE
3 THAT PERSON WOULD NOT BE HAMSTRUNG BY ORDERS THAT HE OR SHE
4 COULD NOT COMMUNICATE WITH THE CASE PROSECUTORS, COMMUNICATION
5 WOULD BE PERMITTED PROVIDED THAT THE PERSON WHO WAS THE
6 FIREWALL DIDN'T TELL THE CASE PROSECUTORS EXACTLY WHAT THE
7 REQUEST WAS.

8 IF, FOR EXAMPLE, THE PERSON -- AND I WOULD EXPECT
9 THAT THE PERSON COULD BECOME CONVERSANT -- MAY NOT BE AS
10 CONVERSANT LIKE THE CASE PROSECUTORS. LET'S ASSUME THAT THOSE
11 ARE LEGITIMATE QUESTIONS ABOUT WHETHER THE PERSON SHOULD
12 OBJECT HERE BEFORE ME TO THE REQUEST AND SAY, "THIS IS NOT
13 RELATED, NOT RELEVANT ENOUGH. YOU OUGHT TO FIND IN FAVOR OF
14 DENYING THE REQUEST TO INTERVIEW THESE PEOPLE OR ASK ABOUT
15 THIS SPECIFIC INFORMATION."

16 THERE WAS NOTHING IN THE ORDER, AND THE TRANSCRIPT
17 MADE QUITE CLEAR THAT THE PERSON COULD COME BACK, TALK TO THE
18 AGENTS, TALK TO THE CASE PROSECUTORS IN ORDER TO EDUCATE
19 HIMSELF OR HERSELF SO THAT THE PERSON COULD MAKE A JUDGMENT
20 AND ACT APPROPRIATELY ON IT.

21 SO, MR. FORGE, THAT'S THE CHRONOLOGY. AS THE
22 DEFENDANT POINTS OUT, THE GOVERNMENT ESSENTIALLY ACQUIESCED TO
23 THESE POSITIONS LAST TIME. IT QUOTES YOU -- IT QUOTES
24 MR. HALPERN SAYING, "OKAY. THAT SOUNDS REASONABLE. WE
25 UNDERSTAND. THAT SOUNDS LIKE A PRACTICAL SOLUTION."

COMPUTER-AIDED TRANSCRIPTION

1 AND THEN IN WHAT HAS BECOME, UNFORTUNATELY, A
2 PRACTICE -- WELL, I DON'T WANT TO SAY A PRACTICE, BUT WHAT
3 HAPPENS MORE THAN ONCE IN THE CASES INVOLVING MR. WILKES, THE
4 GOVERNMENT RETREATED FROM A POSITION THAT HAS BEEN TAKEN HERE
5 IN COURT AND SAID, "NO, WE HAVE CHANGED OUR MIND. WE ARE NOT
6 GOING TO DO THAT."

7 AND I DON'T GET THAT. BEYOND THAT, WE HAD A CHANCE
8 TO FLESH THIS OUT, TALK IT ALL THROUGH. YOU KNOW WHAT WAS AT
9 STAKE. YOU TOOK A POSITION DOWN HERE, AT LEAST ACQUIESCED IN
10 ONE. I HEARD YOUR OBJECTIONS, OVERRULED THEM TO SOME EXTENT,
11 AND I WORKED AROUND THEM TO ANOTHER EXTENT. AND I THOUGHT
12 WHEN WE LEFT HERE IN AUGUST, IT WAS CLEAR WHAT WOULD HAPPEN.

13 THEN I GET THESE PAPERS SAYING, "NO, WE HAVE CHANGED
14 OUR MIND. WE ARE NOT GOING TO DO THIS. WE REFUSE. WE
15 REFUSE."

16 THAT'S WHERE I SEE US. I AM PREPARED TO SIGN THE
17 ORDER THAT'S BEEN PREPARED BY MR. BUTLER. I SUPPOSE IF YOU
18 HAVE AN APPELLATE REMEDY, YOU CAN TAKE THAT REMEDY. OR
19 OTHERWISE, IF YOU DON'T COMPLY WITH THE ORDER, WE'LL GO TO THE
20 NEXT PHASE.

21 MR. FORGE: YOUR HONOR, IF I MAY START OFF, FIRST OF
22 ALL, BY FILLING IN AT LEAST ONE GAP IN THE CHRONOLOGY. IF I
23 MAY APPROACH?

24 THE COURT: SURE. THIS HAS ALREADY BEEN SHOWN TO
25 DEFENSE COUNSEL?

1 MR. FORGE: THIS WAS SOMETHING THAT WAS SENT TO
2 DEFENSE COUNSEL.

3 YOUR HONOR, ONE OF THE PROBLEMS WHEN DEFENSE COUNSEL
4 VIOLATES THE LOCAL RULES AND LETTERS OF COURT IS THAT THE
5 RECORD IS INCOMPLETE. AND I THINK THAT ONE OF YOUR HONOR'S
6 CONCERN REGARDING WHETHER WE ARE GOING ALONG WITH THE PROGRAM
7 THAT IS PUT IN PLACE IS ADDRESSED BY THIS LETTER. WE --

8 (PAUSE IN PROCEEDINGS)

9 THE COURT: WELL, I DON'T KNOW, MR. FORGE. I HAVE
10 LOOKED AT THIS. YOU KNOW, THE WRITTEN ORDER WAS REALLY MORE
11 OF AN AFTERTHOUGHT. I ASKED THE TWO SIDES TO GET TOGETHER
12 FOLLOWING THE COURT'S CONCLUSIONS AND SAID, "PUT THIS IN THE
13 FORM OF AN ORDER." AND TO SAY THE JUDGE HASN'T SIGNED THIS
14 WRITTEN ORDER YET IS FORM OVER SUBSTANCE. THE SUBSTANCE OF
15 THE ORDER WAS SPECIFIED AND DISCUSSED AT LENGTH.

16 MR. FORGE: YOUR HONOR, I AGREE WITH YOU. IT WAS
17 SPECIFIED AND WAS DISCUSSED AT LENGTH. I THINK IT IS EMBODIED
18 IN THE PROPOSED ORDER THAT WE SUBMITTED TO THE COURT. I THINK
19 THAT THE PROPOSED ORDER WE SUBMITTED ENCOMPASSES EVERYTHING
20 THAT WAS DISCUSSED AT THE LAST HEARING.

21 AND JUST TO BE CLEAR FOR YOUR HONOR, WE HAVE TAKEN
22 THE STEPS YOUR HONOR TOLD US TO TAKE. WE HAVE DESIGNATED
23 PEOPLE. SO WE ARE NOT STONEWALLING THIS PROCESS. I DON'T
24 THINK OUR PROPOSED ORDER VIOLATES THE SPIRIT OR THE TERMS OF
25 WHAT YOUR HONOR SAID WE SHOULD BE DOING TO MOVE THIS BALL

1 FORWARD.

2 THE COURT: NO, I DON'T SEE YOUR ORDER AT ALL
3 CONSISTENT WITH THE PROCEDURES I SET FORTH. I THINK THE
4 DEFENDANT'S ORDER -- AND THEY HAVE ATTACHED THE TRANSCRIPT --
5 HAVE YOU LOOKED BACK AT THE TRANSCRIPT OF THE AUGUST 12TH
6 HEARING?

7 MR. FORGE: WE HAD TWO HEARINGS, YOUR HONOR. I KNOW
8 I LOOKED AT THE TRANSCRIPT OF THE FIRST HEARING. I AM PRETTY
9 CERTAIN I LOOKED AT THE TRANSCRIPT OF THE SECOND HEARING AS
10 WELL.

11 THE COURT: WELL, THE ORDER PROPOSED BY DEFENDANT
12 FOGGO IN THIS CASE, AS I READ IT -- AND I HAD THE COPIES OF IT
13 HERE, BUT THAT'S THE ONE I THINK MOST PRECISELY TRACKS WHAT
14 WAS AGREED TO IN PART AND WHAT WAS ORDERED IN PART. AND
15 THAT'S THE ONE THAT I AM PREPARED TO SIGN.

16 DO YOU HAVE SPECIFIC OBJECTIONS?

17 MR. FORGE: I DO, YOUR HONOR.

18 FIRST OF ALL, TURN TO PAGE 2 IN THE ORDER, YOUR
19 HONOR. NUMBER ONE, THIS ORDER GOES BEYOND THE PRESENT
20 DISPUTE, AND IT SHOULDN'T.

21 THE COURT: WHERE DO YOU SEE THAT?

22 MR. FORGE: I SEE THAT IT SAYS, "IT IS FURTHER
23 ORDERED THAT THE DESIGNATED DEPARTMENT OF JUSTICE OFFICIAL
24 DUTIES SHALL BE LIMITED TO REPRESENTED THE GOVERNMENT IN TWO
25 AREAS OF THE LITIGATION. DISPUTES BETWEEN THE CIA AND

1 DEFENDANT FOGGO OVER ACCESS TO SPECIALIZED COMPARTMENT AND
2 INFORMATION COMPARTMENTS."

3 THERE IS NO LIMIT TO THAT.

4 THE COURT: HOLD ON A SECOND.

5 MR. FORGE: PAGE 2 LINES 1 THROUGH 5.

6 THE COURT: WAIT A MINUTE. ON MY ORDER, THE ONE I
7 HAVE, THAT'S ON PAGE 1 LINE 24. LET ME MAKE SURE I AM
8 TRACKING WITH YOU.

9 "IT IS FURTHER ORDERED THAT THE PRE-DISCOVERY
10 DISPUTE DESIGNEES'S DUTIES SHALL BE LIMITED TO REPRESENT THE
11 GOVERNMENT'S POSITION IN TWO AREAS OF LITIGATION DISPUTES
12 BETWEEN THE CIA AND DEFENDANT FOGGO OVER ACCESS."

13 MR. FORGE: YOU HONOR MAY HAVE A DIFFERENT VERSION.
14 I AM NOT SURE.

15 THE COURT: TISH, WILL YOU SHOW THIS TO MR. FORGE.
16 THAT'S THE VERSION I WAS WORKING FROM OVER THE
17 WEEKEND. DID YOU RECEIVE THAT ONE?

18 MR. FORGE: I AM SURE WE DID, YOUR HONOR.

19 THE COURT: YOU MIGHT WANT TO SHOW THIS TO
20 MR. BUTLER. I WANT TO MAKE SURE I AM WORKING FROM THE MOST
21 CURRENT PROPOSED VERSION.

22 MR. BUTLER: I THINK, YOUR HONOR, THAT WAS PRINTED
23 OUT THE LINES -- IT IS IN THE SAME ORDER.

24 MR. FORGE: NO, I DON'T THINK SO. IT IS NOT JUST
25 THE PAGINATION. THIS IS DIFFERENT. THIS IS DIFFERENT THAN

1 THE MOST RECENT ONE.

2 THE COURT: IS THAT THE LATEST ONE, MR. BUTLER, THE
3 ONE MR. FORGE IS HOLDING? THAT'S THE LATEST ONE I RECEIVED.

4 MR. BUTLER: I APOLOGIZE, YOUR HONOR. IT IS.

5 THE COURT: DID THE DIFFERENCES RESOLVE YOUR
6 OBJECTION, MR. FORGE?

7 MR. BUTLER: I THINK THE OPERATIVE LANGUAGE THAT YOU
8 ARE LOOKING AT HAS NOT CHANGED, WHICH IS "IT IS FURTHER
9 ORDERED."

10 I APOLOGIZE, YOUR HONOR. LET ME SEE WHAT THE
11 DIFFERENCES BETWEEN THE TWO PROPOSED ORDERS ARE.

12 MR. FORGE: YOUR HONOR, THE ANOTHER AREA OF CONCERN
13 THAT I HAVE IS WE SHOULD NOT BE RESTRICTED IN ANY WAY AS TO
14 THE COMPOSITION OF THIS TAINTING. THE PROVISION IN HERE --
15 I'LL USE THE ONE THAT YOU HAD, YOUR HONOR.

16 THE PROVISION IN HERE THAT THE PRE-DISCOVERY
17 DISPUTES DESIGNEE SHALL BE A PERSON WHO HAS NOT BEEN ASSIGNED,
18 THERE IS ABSOLUTELY NO REASON FOR THAT. IF WE CHOOSE TO PEAL
19 OFF SOMEONE FROM THE INVESTIGATION OR PROSECUTION TEAM, THEN
20 THAT'S OUR DECISION TO MAKE.

21 THE COURT: I AGREE, BUT IT SEEMS LIKE WE ARE GOING
22 BACKWARDS NOW, BECAUSE WHEN I SUGGESTED THAT LAST TIME -- AND
23 WITH A LITTLE TENTATIVENESS ON MY PART. I DIDN'T WANT TO SAY,
24 THIS PERSON WHO IS VESTED IN THIS CASE IS NOW OFF TO BE A
25 DISCOVERY REFEREE. YOU SAID, "OH, NO, EVERYBODY IS FULLY

1 INVESTED HERE WHO IS ON THIS PROSECUTION TEAM." SO
2 NECESSARILY I THOUGHT WE ARE GOING TO HAVE TO GET SOMEBODY
3 ELSE. HAVE YOU CHANGED YOUR MIND ON THAT?

4 MR. FORGE: HERE IS WHERE WE ARE, YOUR HONOR.

5 WE HAVE SOMEONE WHO IS NOT ON THE TEAM. WE ALSO
6 HAVE A PLAN IN PLACE FOR POTENTIALLY SOMEONE FROM THE TEAM
7 PEELING OFF AND DOING THAT. WE ARE NOT SURE WHERE THIS
8 DISPUTE IS GOING TO END OR HOW IT IS GOING TO PROCEED, AND WE
9 WANT TO PRESERVE THE OPTION OF HAVING SOMEBODY FROM THE
10 PROSECUTION TEAM PEELING OFF AND JOINING THIS DISPUTE.

11 THE COURT: THAT PART DOESN'T MATTER TO ME,
12 MR. FORGE, PROVIDED -- LOOK, HERE IS THE BOTTOM LINE. THE
13 TWAIN SHOULDN'T MEET, THOUGH. THE PEOPLE WHO DO THE PEELING
14 OFF OR WHO ARE DESIGNATED TO REVIEW THE EX PARTE APPLICATIONS,
15 THE SEALED MEMORANDA SPECIFYING WHY THE DEFENSE THINKS THIS IS
16 RELEVANT SHOULD NEVER COME BACK TO THE CASE PROSECUTORS AND
17 SAY, "HERE IS WHAT THEY ARE DO WITH THESE WITNESSES. HERE IS
18 WHY THEY THINK THIS IS RELEVANT." THAT SHOULDN'T HAPPEN.
19 THAT'S WHAT I AM TRYING TO ACCOMPLISH.

20 MR. FORGE: WE DEFINITELY GET THAT.

21 THE COURT: WHETHER WE HAVE FIVE PEOPLE ASSIGNED TO
22 THE TASK OR ONE, IT DOESN'T MATTER TO ME. AND YOU ARE RIGHT.
23 YOU ARE IN THE BEST POSITION. YOU HAVE THE PREROGATIVE TO SAY
24 HOW YOU ARE GOING TO IMPLEMENT THE ORDER.

25 MR. FORGE: THE OTHER ISSUE THAT I RAISED -- AND

1 MR. BUTLER IS CORRECT ON THIS ONE. THOSE TWO AREAS ARE THE
2 SAME, AND I THINK IT GOES BEYOND THE PRESENT DISPUTE.

3 THE COURT: TELL ME WHAT TWO AREAS YOU ARE TALKING
4 ABOUT NOW.

5 MR. FORGE: THESE ARE THE TWO CATEGORIES, THE TWO
6 AREAS OF LITIGATION. THE FIRST IS THE DISPUTE BETWEEN THE CIA
7 AND DEFENDANT FOGGO OVER ACCESS TO SPECIALIZED DEPARTMENT
8 INFORMATION.

9 THE COURT: YOU AGREE THAT THAT'S IMPLICATED?

10 MR. FORGE: I AGREE THAT THAT'S IMPLICATED, BUT I
11 THINK THIS SHOULD BE NARROWED TO THE PRESENT ISSUE BEFORE THE
12 COURT. THEY HAVE IDENTIFIED TWO SPECIFIC AREAS. I THINK IT
13 SHOULD BE NARROWED TO THOSE SPECIFIC AREAS.

14 THE COURT: ACCESS TO THESE EIGHT WITNESSES, RIGHT?
15 THE EIGHT WHO HAVE AGREED TO TALK. AND THE OTHER?

16 MR. FORGE: AS FAR AS I KNOW, JUST ACCESS TO THESE
17 EIGHT WITNESSES REGARDING THESE TWO SPECIFIC COMPARTMENTS.

18 THE COURT: I THINK THERE WAS SOME DOCUMENTS THAT
19 WERE IMPLICATED, TOO.

20 MR. BUTLER: NOT AT THIS POINT, YOUR HONOR. WE
21 IDENTIFIED TWO AREAS OF COMPARTMENTAL INFORMATION THAT WE
22 WANTED TO BE READ INTO THESE COMPARTMENTS SO WE COULD QUESTION
23 THE WITNESSES WHO AGREED TO MEET WITH US.

24 THE REASON -- I APOLOGIZE FOR THE DISCREPANCY OF THE
25 TWO ORDERS. WE WILL GO BACK AND CHECK THEM. I DON'T

1 UNDERSTAND WHAT HAPPENED THERE.

2 BUT THE REASON WE MADE IT A LITTLE BROADER, THE
3 OPERATIVE SENTENCE IS THIS, YOUR HONOR, THAT THE DESIGNATED
4 DEPARTMENT OF JUSTICE OFFICIAL WOULD BE REPRESENTING THE
5 GOVERNMENT IN TWO AREAS. THE FIRST DISPUTE IS BETWEEN THE CIA
6 AND DEFENDANT FOGGO OVER ACCESS TO SPECIALIZED COMPARTMENT AND
7 INFORMATION THAT DEFENSE COUNSEL BELIEVES TO BE RELEVANT TO
8 THE DEFENSE.

9 AND THE REASON WE MADE IT BROADER IS THERE MAY BE
10 ADDITIONAL COMPARTMENTS THAT WE WANT TO REQUEST THAT WOULD BE
11 AGREED TO AS WE CONTINUE TO REVIEW THE DISCOVERY, SOME OF
12 WHICH WE JUST RECEIVED OR ARE IN THE PROCESS OF RECEIVING, AND
13 WE DON'T WANT TO COME BACK TO THE COURT.

14 THE COURT: I AGREE WITH THAT, MR. FORGE, BECAUSE
15 THAT'S WHERE WE ESSENTIALLY ARE TODAY. IT STARTED OFF WITH
16 THE CIA AGREEING TO SOME, AND THEN THEY SAID, WELL -- AND I
17 HESITATE TO USE THIS NOMENCLATURE ABOUT BEING READ INTO THE
18 COMPARTMENT. THIS IS AN INTERVIEW WITH WITNESSES THAT THE
19 DEFENSE THINKS ARE RELEVANT.

20 THESE WITNESSES HAPPEN TO BE CIA EMPLOYEES, SO THEY
21 ARE SUBJECT TO TOUHY REGULATIONS AND THE INTERVIEW, YOU KNOW,
22 BEGETS A NEED, AT LEAST ON THE JUDGMENT OF THE DEFENSE
23 COUNSEL, TO GO A LITTLE FURTHER AND SAY, "WE WANT TO KNOW
24 ABOUT MORE, BECAUSE THE CIA SEGREGATES EVERY BIT OF
25 INFORMATION AND SAID, WELL, THIS NEW INFORMATION IS EVEN MORE

1 SECRET THAN THE OLD STUFF, WE NEED NEW AUTHORIZATION."

2 I DON'T WANT THEM TO HAVE TO COME BACK EVERY TIME.

3 MR. FORGE: YOUR HONOR, THIS LANGUAGE IS SO BROAD,
4 IT WOULD ENCOMPASS DISPUTES THAT WE HAVE REGARDING COMPARTMENT
5 INFORMATION THAT'S ALREADY BEEN FLUSHED OUT IN THIS CASE.

6 WHAT THEY ARE SAYING IS ANY DISPUTES OVER ACCESS OVER
7 SPECIALIZED COMPARTMENT INFORMATION THAT DEFENSE COUNSEL
8 BELIEVES TO BE RELEVANT TO DEFENSE. THAT COULD INCLUDE --
9 THAT DOES INCLUDE THE LITERAL LANGUAGE OF THIS PROVISION HERE,
10 EVERYTHING. EVERYTHING THAT'S CLASSIFIED IN THIS CASE.

11 THE COURT: I DON'T THINK THAT'S THEIR INTENTION.
12 IT IS CERTAINLY NOT MINE. THIS DISPUTE IS LIMITED TO ACCESS
13 TO THESE EIGHT WITNESSES WHO HAVE AGREED TO TALK TO DEFENSE
14 COUNSEL.

15 MR. FORGE: THAT'S FINE. WE WANT THE ORDER TO SAY
16 THAT.

17 THE COURT: PENCIL THAT IN.

18 MR. FORGE: IN ADDITION, I WANT TO MAKE SURE WE ARE
19 CLEAR. ON THE SECOND PAGE IT SAYS HERE THAT IN TERMS OF
20 LIMITING THE DESIGNEE'S COMMUNICATION WITH THE PROSECUTION
21 TEAM PRECLUDES ANY COMMUNICATION OF ANY KIND RELATING TO THE
22 EXISTENCE, IDENTITY, CONTENT OR SUBJECT MATTER OF ANY PROFFER.

23 OBVIOUSLY, THE SUBJECT MATTER OF THE PROFFER IS THE
24 COMPARTMENT THAT WE WERE AWARE OF, AND THAT'S PRECISELY WHAT
25 WE ARE SUPPOSED TO BE TALKING TO THE DESIGNEE ABOUT. WE ARE

1 SUPPOSED TO BE TALKING TO THE DESIGNEE ABOUT THAT SUBJECT
2 MATTER. WE ARE SUPPOSED TO BE EXPLAINING TO THAT INDIVIDUAL
3 WHY IT IS THAT MATTER IS NOT RELEVANT TO OUR THEORY OF THE
4 CASE AND WHY WE FEEL IT IS NOT RELEVANT TO THE DEFENSE.

5 SO I REALLY THINK, YOUR HONOR, THAT IT IS A SHORT
6 PROPOSED ORDER, BUT THERE ARE THREE PROVISIONS JUST WITHIN THE
7 SHORT ORDER THAT GO BEYOND WHAT IS NECESSARY. I AM LOOKING AT
8 OUR PROPOSED ORDER AND IF -- WITH THE CHANGES I HAVE NOTED, I
9 DON'T THINK THERE IS A PROBLEM.

10 THE COURT: YOU HAVEN'T GIVEN ME A PROPOSAL. I
11 UNDERSTAND WHAT THEY ARE TRYING TO DO. I THINK EVERYONE
12 UNDERSTANDS BUT WHAT I HAVE PERMITTED HERE AND WHAT I HAVE
13 SAID IS NOT COVERED.

14 OBVIOUSLY, THIS FIREWALL TEAM WILL BE ABLE TO COME
15 BACK AND CONSULT WITH YOU IN ORDER TO EDUCATE HIMSELF, HERSELF
16 OR THEMSELVES ABOUT WHETHER TO OPPOSE THE DISCOVERY REQUEST BY
17 COMING TO ME.

18 MR. FORGE: THAT'S RIGHT. HOW TO EXPLAIN WHY WE ARE
19 OPPOSED TO IT.

20 THE COURT: RIGHT, BUT IT IS A FINE LINE. THEY
21 CAN'T SAY, "LOOK, HERE IS PRECISELY WHAT THE DEFENSE WANTS."
22 THAT'S WHAT I AM TRYING TO AVOID IN THE FIRST INSTANCE.

23 SO I UNDERSTOOD THE LANGUAGE IN THAT SECOND PART TO
24 IMPLICATE JUST THAT; THAT THEY ARE PROHIBITED FROM TELLING YOU
25 ANYTHING THAT'S CONTAINED IN THE SPECIFIC REQUESTS THAT ARE

1 MADE TO THEM BY THE DEFENSE.

2 NOW, IF THEY WANT TO COME BACK AND TO DISCUSS
3 GENERALLY WITH YOU -- AND AS I SAID, THE TRANSCRIPT COVERS
4 THIS, BECAUSE I THINK IT WAS YOU, MR. FORGE, WHO RAISED THE
5 ISSUE ABOUT ACCESS TO THE AGENTS, TOO, IN ORDER TO FURTHER
6 EDUCATE THEMSELVES TO KNOW WHETHER THE GOVERNMENT WOULD OPPOSE
7 OR NOT OPPOSE THE REQUEST TO LET THE DEFENSE COUNSEL INTERVIEW
8 THESE EIGHT WITNESSES ON MORE SPECIFIC SUBJECTS.

9 MR. FORGE: THAT'S RIGHT. I THINK IT IS IMPERATIVE
10 THAT THE PERSON HAVE ACCESS.

11 THE COURT: HERE IS WHAT I'LL DO, MR. FORGE. IF YOU
12 THINK YOU CAN CRYSTALLIZE THAT, BECAUSE THAT'S THE ORDER,
13 THERE IS NO DISPUTE ABOUT THAT; RIGHT, MR. BUTLER?

14 MR. BUTLER: NO.

15 THE COURT: IF YOU THINK YOU CAN WITH A BETTER
16 CHOICE OF LANGUAGE CRYSTALLIZE THAT SPECIFIC ACCOMMODATION,
17 THEN HAVE AT IT, AND I WILL SIGN THIS AMENDED ORDER WITH THE
18 TWO CLARIFICATIONS THAT YOU HAVE ASKED FOR.

19 ONE, THAT THIS ORDER PERTAINS TO ACCESS TO THE EIGHT
20 WITNESSES WHO CAN IDENTIFY; AND TWO, THAT NOTHING PREVENTS
21 CONSULTATION BY THE TEAM WITH THE CASE PROSECUTORS PROVIDED
22 THE TAIN TEAM DOES NOT TELL THE CASE PROSECUTORS THE
23 SPECIFICS OF THE OFFER OF PROOF MADE BY THE DEFENSE.

24 MR. FORGE: AND THEN THE THIRD, I THINK, EVERYBODY
25 AGREES THERE IS NO RESTRICTION ON WHOM WE CAN PUT ON THE TAIN

1 TEAM SO LONG AS THEY DON'T JUMP BACK OVER THE FENCE.

2 THE COURT: YOU DON'T HAVE ANY PROBLEM WITH THAT.

3 IF THEY WANT TO PUT FIVE PEOPLE ON THIS TEAM, LET THEM.

4 MR. BUTLER: NO, YOUR HONOR.

5 THE COURT: HOW LONG WILL IT TAKE YOU, MR. FORGE, TO
6 MAKE THESE CLARIFICATIONS? I WANT TO SIGN THE ORDER SO WE
7 HAVE A SIGNED DOCUMENT TODAY.

8 MR. FORGE: CAN I HAVE UNTIL 10:00, YOUR HONOR?

9 THE COURT: OF COURSE.

10 ANYTHING ON BEHALF OF MR. WILKES YOU WANT TO ADD? I
11 AM ASSUMING YOU ARE IN AGREEMENT WITH THE PROPOSED ORDER?

12 MR. CAHN: WE ARE, YOUR HONOR. I ONLY HAVE ONE
13 HOUSEKEEPING MATTER. I ASK FOR THE CONTINUATION OF THE
14 HEARING WHEN WE ARE COMING BACK THAT MR. WILKES'S PRESENCE CAN
15 BE EXCUSED, BECAUSE HE IS OBVIOUSLY OCCUPIED WITH OTHER
16 MATTERS.

17 THE COURT: YES, OF COURSE.

18 MR. CAHN: I HATE TO BREAK HIS RECORD BUT --

19 THE COURT: IT'S FOR SUBMISSION OF THE ORDER. WHAT
20 I'LL ASK YOU TO DO IS TO SHOW IT TO COUNSEL FOR BOTH
21 DEFENDANTS, AND YOU HAVE THE ABILITY TO HAVE THIS RETYPED SO
22 WE DON'T HAVE A LOT OF INTERLINEATIONS?

23 MR. FORGE: I THINK WE ONLY HAVE THIS IN PDF FORM,
24 BUT WE WILL TAKE CARE OF IT.

25 THE COURT: AS YOU CAN SEE, MY SIGNATURE IS ALREADY

1 ON THAT ONE. WITH THE REQUEST -- THE MODIFICATIONS YOU
2 REQUEST, MR. FORGE, I AM PREPARED TO SIGN IT FORTHWITH SO WE
3 CAN GO FORWARD WITH THIS AND HAVE THIS CASE READY TO BE
4 TRIED.

5 MR. FORGE: OKAY, YOUR HONOR.

6 THE COURT: ANYTHING ELSE?

7 MR. CAHN: NOTHING FOR MR. WILKES, YOUR HONOR.

8 THE COURT: WHEN IS THE NEXT STATUS DATE ON THIS
9 CASE?

10 MR. CAHN: I DON'T KNOW WHEN IT IS SET. I THINK IT
11 WOULD BE APPROPRIATE TO SET ONE.

12 THE CLERK: WE HAVEN'T SET ONE.

13 THE COURT: I THINK WE BETTER SET A DATE FOR STATUS
14 AND TRIAL SETTING NOW THAT MR. WILKES IS REPRESENTED ON THIS
15 CASE.

16 YOU HAVE A SUGGESTED DATE FOR THAT? YOU ARE GOING
17 TO BE BACK OUT HERE, MR. BUTLER?

18 MR. BUTLER: AT THE COURT'S CONVENIENCE, YOUR HONOR.
19 I JUST WOULD SAY WE ARE STILL HAVING TROUBLE -- NOT TO BURDEN
20 THE COURT -- WITH ACCESS TO CLASSIFIED INFORMATION, ACCESS TO
21 SKIFFS, AND INDEED, WE ARE STILL RECEIVING DISCOVERY. SO WE
22 DO CONSIDER OURSELVES TO BE PRETTY FAR AWAY FROM EVEN TEAMING
23 UP SOME OF THE CIPA ISSUES WE BELIEVE THAT ARE GOING TO BE
24 SUBSTANTIAL BEFORE THE TRIAL. SO WE ARE AVAILABLE AT THE
25 COURT'S CONVENIENCE FOR STATUS CONFERENCE.

COMPUTER-AIDED TRANSCRIPTION

1 THE COURT: HOW ABOUT THE SECOND WEEK OF NOVEMBER?

2 MR. CAHN: YOUR HONOR, UNFORTUNATELY, I COMMITTED TO
3 TEACHING AT THE FEDERAL DEFENDERS BABY DEFENDER ORIENTATION
4 THAT WEEK.

5 THE COURT: THE THIRD WEEK OF NOVEMBER, IS THAT
6 THANKSGIVING WEEK?

7 MR. CAHN: YES, I'LL BE HERE.

8 THE COURT: YOU COULD APPEAR BY TELEPHONE, IF THAT'S
9 CONVENIENT.

10 MR. BUTLER: THAT'S FINE, YOUR HONOR.

11 THE COURT: IT'LL JUST BE A TRIAL SETTING, MOTION
12 SETTING DATE.

13 MR. BUTLER: THAT'S FINE.

14 THE COURT: I UNDERSTAND THERE IS A LOT OF
15 INTERMEDIATE ISSUES THAT NEED TO BE DECIDED, BUT WHAT I DO IS
16 SET THE DATE FOR SUBSTANTIVE MOTIONS AND WE SET A TRIAL
17 DATE.

18 MR. BUTLER: IF IT IS POSSIBLE, YOUR HONOR, COULD WE
19 DO IT EARLIER IN THE WEEK IN CASE WE DECIDE TO SEND A PERSON
20 TO SHOW UP IN THE WEEK.

21 MR. BUTLER: THAT'S FINE, YOUR HONOR.

22 THE COURT: WOULD THE MONDAY AFTER THANKSGIVING BE
23 CONVENIENT?

24 MR. BUTLER: BEFORE IS FINE, EITHER WAY.

25 THE CLERK: NOVEMBER 19TH.

1 THE COURT: MR. CAHN MAY BE GONE THE 19TH.

2 MR. CAHN: THE 19TH I AM THERE. IT'S THE PRIOR
3 WEEK.

4 THE COURT: WHY DON'T WE SET THIS NOVEMBER 19TH AT
5 9:30 FOR TRIAL SETTING AND MOTION DATE, THEN.

6 MR. FORGE: YOUR HONOR, COULD WE ALSO PUT THE CIPA
7 PRETRIAL CONFERENCE FOR THAT DAY AS WELL?

8 THE COURT: SURE. 9 O'CLOCK, THEN. IF YOU WANT TO
9 APPEAR BY TELEPHONE, YOU MAY, MR. BUTLER.

10 MR. BUTLER: THANK YOU, YOUR HONOR.

11 THE COURT: MR. GERAGOS, DID YOU HAVE SOMETHING.

12 MR. GERAGOS: I DID, YOUR HONOR. I FIGURED SINCE
13 YOU WERE TALKING ABOUT THE CLASSIFIED INFORMATION, AND IT'S
14 BEEN REPRESENTED REPEATEDLY INSPITE OF THE FACT THAT I HAD
15 INDICATED TO THE COURT THAT I KNEW THAT THERE WAS INFORMATION
16 IN THE CLASSIFIED PORTION THAT WAS RELEVANT TO THE DEFENSE.

17 WHEN MS. CHARLICK AND MR. CAHN HAD GONE OVER THERE
18 AND I BELIEVE SPENT THREE HOURS IN THE SKIFF, THEY HAVE
19 ALREADY IDENTIFIED A SET OF INFORMATION WHICH WAS PROVIDED TO
20 ME, WHICH APPARENTLY WAS DECLASSIFIED RIGHT AFTERWARDS, WHICH
21 I AM AT A LOSS TO UNDERSTAND AS TO HOW I DIDN'T GET IT IN THE
22 FIRST PLACE.

23 THE COURT: RELATED TO?

24 MR. GERAGOS: RELATED TO WILKES/MICHAEL AND
25 SPECIFICALLY HAS NOW BEEN TURNED OVER. AND I APPRECIATE THE

1 FACT THAT IT HAS NOW BEEN TURNED OVER BUT FOR THE FACT THAT
2 MR. WILKES'S LAWYERS IN WILKES/FOGGO HAD GONE TO THE SKIFF AND
3 SPENT THREE HOURS, AND SPECIFICALLY HAD GONE AFTER I HAD
4 SPOKEN TO THEM AND TOLD THEM WHAT I THOUGHT WOULD BE THERE,
5 AND I THOUGHT WE HAVE ONLY SCRATCHED THE SURFACE AS TO THE
6 INFORMATION THAT'S CONTAINED THAT I BELIEVE IS PROBABLY
7 CLASSIFIED AND THAT IS THERE AND THAT I DON'T HAVE AND I NEED
8 BEFORE THEY CALL JOEL COMBS IN THIS CASE.

9 CLEARLY, I SHOULD HAVE HAD IT BEFORE MITCHELL WADE,
10 BUT THAT'S A COMPLETELY DIFFERENT STORY. THIS COURT HAS ASKED
11 AND INQUIRED, BASED UPON NUMEROUS MOTIONS THAT I HAVE MADE, IS
12 THERE ANYTHING OVER THERE -- AND I CAN'T TELL YOU HOW MANY
13 TIMES MR. HALPERN HAS RESPONDED NO, ALTHOUGH HESITANT, BUT
14 THEN EVENTUALLY WOULD BE NO -- AND CLEARLY, NOW WE HAVE IT.
15 AND I WOULD REITERATE AND I THINK MS. CHARLICK CAN TELL YOU
16 ONLY WHEN SHE HAD GONE BACK TO MR. BHANDARI AND SAID, "LOOK,
17 THIS ISN'T IN THE OTHER DISCOVERY."

18 AND I THINK THAT'S A SIGNIFICANT PROBLEM AT THIS
19 POINT COMING THAT WE ARE A WEEK AND A HALF INTO TRIAL.

20 MR. FORGE: YOUR HONOR, MY UNDERSTANDING IS THE
21 DOCUMENT MR. GERAGOS IS HOLDING IS JOEL COMBS'S INTERVIEW AND
22 PERHAPS EXHIBIT RELATED TO THAT INTERVIEW.

23 IT IS MY UNDERSTANDING THAT ONLY ONE PARAGRAPH OF
24 THAT INTERVIEW RELATES TO THE WILKES/MICHAEL CASE AND THAT THE
25 INFORMATION CONTAINED IN THAT PARAGRAPH IS CONTAINED IN OTHER

1 DOCUMENTS AND TRANSCRIPTS AND INTERVIEW MEMORANDAS THAT
2 MR. GERAGOS HAS RECEIVED IN THE WILKES/MICHAEL CASE.

3 NEVERTHELESS, IN AN ABUNDANCE OF CAUTION, WE HAD IT
4 DECLASSIFIED SO WE CAN TURN IT OVER TO MR. GERAGOS. I AM NOT
5 AWARE OF ANYTHING PERTAINING TO MR. WADE THAT IS IN THE
6 WILKES/FOGGO CASE IS CLASSIFIED AND HASN'T BEEN PRODUCED.

7 WE ARE DOING THE BEST WE CAN, YOUR HONOR. THIS
8 IS -- IF IT IS -- TO THE EXTENT IT IS DISCOVERABLE, IT IS
9 JENCKS MATERIAL. MR. COMBS HASN'T BEEN CALLED YET. HE IS NOT
10 GOING TO BE CALLED TOMORROW, AND WE ARE STILL PROVIDING WELL
11 IN ADVANCE OF HIS TESTIMONY. AS I ALREADY INDICATED, IT'S
12 DUPLICATIVE OF INFORMATION MR. GERAGOS ALREADY HAS.

13 THE COURT: YOU FIND THAT TO BE TRUE.

14 MR. GERAGOS: NO, IT IS CATEGORICALLY NOT TRUE. I
15 THINK THE COURT HAS NOTICED THROUGHOUT THIS TRIAL SO FAR, THE
16 GOVERNMENT HAS THEIR OWN PECULIAR VIEW OF WHAT IT IS THAT'S
17 RELEVANT, AND THE COURT I THINK ON NUMEROUS OCCASIONS HAS
18 REMINDED THE GOVERNMENT JUST BECAUSE IT IS THEIR THEORY DOES
19 NOT EXCLUDE WHAT THE DEFENSE'S THEORY IS.

20 I AM NOT GOING TO DIVULGE -- OBVIOUSLY, THEY HAVE
21 NOT PICKED UP ON THE DEFENSE'S THEORY OR THEY DON'T WANT TO.
22 THE FACT REMAINS THIS INTERVIEW IS REPLETE WITH INFORMATION
23 THAT IS -- THAT GOES DIRECTLY TO THE DEFENSE'S THEORY OF THE
24 CASE, WHETHER THEY UNDERSTAND IT OR NOT. I THINK THEY DO, AND
25 THEY JUST DETERMINE TO STICK THEIR HEAD IN THE SAND.

COMPUTER-AIDED TRANSCRIPTION

1 THE FACT REMAINED I HAVE EXPLAINED IT BEFORE. IT
2 TOOK TWO EXPERIENCED LAWYERS MERELY THREE HOURS TO FIND THE
3 INFORMATION. HOW THEY COULD SAY A DEBRIEFING OF MR. COMBS
4 WHICH THEY ALL ATTENDED, WHICH IS AN EXTREMELY LENGTHY
5 DEBRIEFING THAT ONLY ONE PARAGRAPH PERTAINS TO THIS CASE IS
6 LAUGHABLE. I COULD GO ON FOR FOUR HOURS AS TO THE AMOUNT OF
7 MATERIAL IN HERE THAT IS CLEARLY GERMANE AND RELEVANT TO
8 MR. COMBS TAKING THE STAND.

9 IT'S EXACTLY WHAT I HAD INDICATED TO THE COURT
10 BEFORE I THOUGHT THE PROBLEM WAS HERE THAT THEY HAVE SET UP AN
11 ARTIFICIAL WALL, AND THEY NEED TO TURN OVER EVERYTHING THAT
12 THEY HAVE, OR THE REMEDY IS FOR YOU TO DECLARE A MISTRIAL.
13 THEY JUST CAN'T SIT ON THIS STUFF AND CLAIM THAT IT'S
14 CLASSIFIED.

15 THE COURT: MR. FORGE, I'LL ACCEPT NOW THAT THIS
16 MATERIAL HAS BEEN TURNED OVER. MR. COMBS HAS NOT BEEN CALLED.
17 HE IS GOING TO BE CALLED, NOT TOMORROW BUT AT A SOME LATER
18 POINT SO MR. GERAGOS WILL HAVE ENOUGH TIME TO GO OVER THIS.

19 I ACCEPT THE REPRESENTATION THAT THIS AMOUNTS TO
20 JENCKS AND YOU WEREN'T LEGALLY OBLIGATED. HERE IS WHAT
21 CONCERNS ME, THOUGH.

22 THERE IS GOING TO BE AT SOME POINT FULL DISCOVERY OF
23 THE WILKES/FOGGO MATERIAL BY COUNSEL REPRESENTING MR. WILKES.
24 NOW, OBVIOUSLY, MR. CAHN AND MS. CHARLICK ARE AWARE WHAT'S
25 IMPLICATED IN WILKES/MICHAEL. I HATE TO THINK THAT SOMETHING

1 IS GOING TO COME GURGLING UP AFTER I HAD BEEN REPEATEDLY TOLD
2 THERE IS NO CLASSIFIED INFORMATION. AND IN FACT, THAT WAS
3 PART OF THE GENESIS FOR DENYING THE MOTION THAT MR. GERAGOS
4 MADE TO BE RELIEVED ON THIS CASE.

5 I SAID NO CLASSIFIED INFORMATION. THE CONFLICT
6 DOESN'T EXIST HERE. I DON'T SEE THE CONNECTION BETWEEN THE
7 TWO CASES, AT LEAST TO THE EXTENT THAT IT WOULD JUSTIFY YOUR
8 MOTION TO BE RELIEVED HERE FOR LACK OF ACCESS TO INFORMATION.

9 NOW, I HAVE RELIED ON THAT REPRESENTATION. THERE IS
10 OBVIOUSLY TOO MUCH INFORMATION FOR ME TO DIG IN MYSELF AND
11 MAKE THE DETERMINATIONS FIRSTHAND. BUT IF IT IS AS
12 MR. GERAGOS SAYS, I THINK YOU ARE -- THE GOVERNMENT IS
13 DREADING VERY DANGEROUSLY, BECAUSE IF SOME INFORMATION GURGLES
14 UP AND YOU KNOW IT'S GOING TO BE REVIEWED BY COUNSEL THAT ARE
15 LOOKING AFTER MR. WILKES'S INTEREST IN THE WILKES/FOGGO CASE.

16 IF THAT COMES UP HAVE AFTERWARDS, I CAN'T IMAGINE --
17 IF IT IS SIGNIFICANT AND IT HASN'T BEEN TURNED OVER, I CAN'T
18 IMAGINE YOU'D HAVE A LEG TO STAND ON WHEN HE BRINGS A MOTION
19 FOR A NEW TRIAL AND SAYS, "LOOK, THERE WAS A DISCOVERY
20 VIOLATION HERE. THERE WERE SPECIFIC REFERENCES TO
21 REPRESENTATIONS. THIS MATTER CAME UP OVER AGAIN. I THINK
22 THAT'S A BIG PROBLEM.

23 I DON'T KNOW WHAT TO TELL YOU OTHER THAN YOU BETTER
24 BE SURE ABOUT THESE REPRESENTATIONS AND YOU BETTER REDOUBLE
25 YOUR EFFORTS, BECAUSE IF IT IS AS HE SAYS AND THERE IS MORE

1 THAN A PARAGRAPH AND IT IS NOT SIMPLY INFORMATION THAT'S
2 ALREADY BEEN PROVIDED IN OTHER FORM, THAT'S A PROBLEM FOR THE
3 GOVERNMENT.

4 MR. FORGE: I UNDERSTAND, YOUR HONOR. I TAKE IT TO
5 HEART, AND WE WILL CONTINUE EVERYTHING WE CAN TO MAKE SURE WE
6 ARE NOT OVERLOOKING SOMETHING. THAT'S THE BEST WE CAN DO.
7 EVERY TIME WE HAVE MADE REPRESENTATION TO THE COURT, IT HAS
8 BEEN IN GOOD FAITH, AND WE HAVE DONE THE BEST WE CAN TO MAKE
9 SURE THAT ANYTHING THAT IS DISCOVERABLE IN THE WILKES/MICHAEL
10 CASE HAS, IN FACT, BEEN PRODUCED.

11 MR. GERAGOS HAS SPOKEN ON NUMEROUS OCCASIONS ABOUT
12 FOUR TERABYTES OF INFORMATION.

13 MR. GERAGOS: FIVE.

14 MR. FORGE: FIVE TERABYTES OF INFORMATION THAT HAS
15 BEEN TURNED OVER. THIS IS ONE INTERVIEW MEMORANDUM THAT
16 SLIPPED AND THANKFULLY, THANKS TO MR. CAHN AND MS. CHARLICK,
17 IT WAS CAUGHT BEFORE THE WITNESS WAS CALLED. SO I UNDERSTAND
18 WHAT YOU ARE SAYING, AND I AGREE WITH YOU. THIS IS A CONCERN.
19 WE WILL BE VIGILANT.

20 THE COURT: OKAY. WELL, YOU HAVE TO BE RIGHT, TOO,
21 NOT JUST VIGILANT. AS I SAID, AT THE END OF THE DAY I KEPT
22 HIM ON THE CASE AND DENIED HIS MOTION TO BE RELIEVED, BECAUSE
23 I ACCEPTED THE REPRESENTATION THAT NOTHING CLASSIFIED WAS
24 IMPLICATED IN THE WILKES/MICHAEL CASE. AND THEREFORE, THERE
25 WAS NO REASON TO RELIEVE HIM ON A CASE WHERE HE MADE A GENERAL

1 APPEARANCE AND WAS OTHERWISE PREPARED TO TRY THE CASE.

2 THE FOUNDATION FOR HIS REQUEST TO BE RELIEVED IS "I
3 AM NOT GOING TO HAVE ACCESS TO SOME MATERIAL TO DEFEND THIS
4 FELLOW." AND I SAID, "NO, NO. I AM ASSURED BY THE GOVERNMENT
5 THAT YOU HAVE EVERYTHING YOU NEED TO DEFEND THIS FELLOW." NOW
6 THERE ARE A COUPLE OF HOLES IN THE DYKE HERE, SMALL HOLES, BUT
7 NONETHELESS, HOLES.

8 SO GO BACK AND TAKE A LOOK AT THIS OTHER MATERIAL OR
9 HAVE SOMEBODY DO IT. AND IF THERE IS ANYTHING ELSE, IT SHOULD
10 BE TURNED OVER FORTHWITH TO MR. GERAGOS. WE ARE STARTING
11 AGAIN TOMORROW AT 9:00 O'CLOCK.

12 YOU ARE NOT MAKING A MOTION FOR MISTRIAL, ARE YOU?
13 I CAN'T IMAGINE THAT YOU WOULD.

14 MR. GERAGOS: I WOULD BE INSANE TO AT THIS POINT.
15 SO, NO, I AM NOT.

16 I WOULD MAKE A MOTION THAT THEY, AS OPPOSED TO
17 TELLING ME WHOM THEY ARE NOT GOING TO CALL TOMORROW, THAT THEY
18 BEFORE NOON TELL ME WHOM THEY ARE GOING TO CALL TOMORROW.

19 MR. FORGE: WE SENT THAT E-MAIL, YOUR HONOR.

20 MR. GERAGOS: TODAY?

21 MR. FORGE: YES.

22 MR. GERAGOS: GREAT. THANK YOU. I APPRECIATE THAT
23 AND I'LL SEE YOU AT 9 O'CLOCK IN THE MORNING.

24 THE COURT: GET IT TO ME BEFORE NOON. GO UP TO YOUR
25 OFFICE, MAKE THE CHANGES IN CONSULTATION WITH COUNSEL FOR THE

1 DEFENDANTS AND THEN HAVE THE ORDER BACK TO ME, MR. FORGE, BY
2 NOON. THANK YOU.

3 MR. BUTLER: THANK YOU, YOUR HONOR.

4 --000--

5
6 I HEREBY CERTIFY THAT THE TESTIMONY
7 ADDUCED IN THE FOREGOING MATTER IS
8 A TRUE RECORD OF SAID PROCEEDINGS.

9
10 S/EVA OEMICK 11-15-07
11 EVA OEMICK DATE
12 OFFICIAL COURT REPORTER
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COMPUTER-AIDED TRANSCRIPTION